sufficient to deprive her of her free will in executing the deed, it might also be sufficient to prevent her attempting to cancel it so long as her son's debt to the bank was unsatisfied and he remained liable to criminal prosecution.[23] Furthermore, the position of the lower court seems reasonable, that the failure of the mother to intervene in the foreclosure proceedings would not operate as a bar, since the proceedings were against the son and the mother had not been made a party defendant.

J. B. G., 2nd.

CONTRACTS ILLEGAL BY STATUTE.—The question whether a transaction comes within the prohibition of a statute would appear, at first thought, to be purely one of construction. The inquiry that naturally suggests itself in every case in which the legality of a contract, involving some act or transaction within the purview of a prohibitory or penal statute, is in question, is: Does the Act forbid the contract? It is obvious that the solution of the problem represented by the question may involve two distinct lines of inquiry. The purpose of one is to determine the legislative intent, in respect of the effect of the statute on contracts founded upon or growing out of a violation of the act. On the other hand, in those cases where the contract is not directly founded upon a violation or evasion of the statute, either in its consideration or immediate purpose, and involves only indirectly a breach of the law, a second inquiry may be necessary to determine whether it may not, in spite of the remoteness of the connection, be affected by the illegality.[1]

The various rules adopted by the courts, purporting to be rules of construction, have tended to become crystallized to such an extent that they serve in many instances to control, rather than interpret, the legislative intent. It is a rule universallv accepted that, if a statute renders a contract illegal, such a contract, if made, is wholly void and cannot be enforced; but there is considerable difference of method in determining what contracts are made unlawful by legislative enactment. A majority of the courts have adhered to the rule that each statute must be construed with reference to its language, subject matter, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished by its enactment.[2] The object of the construction in such cases is to determine the intention of the legislature as to the legality of the contract itself, considered as a subject matter of legislative intent, distinct and apart from the transaction which forms the consideration of the contract and which is the immediate

[23] Allen v. Leflore County, 78 Miss. 671, 29 So. 161 (1900); Wilson v. Calhoun, 170 Iowa 111, 151 N. W. 1087 (1915).

[1] See Toler v. Armstrong, 4 Wash. C. C. Rep. 297 (1822).

[2] Bowditch v. Ins. Co.— 141 Mass. 292, 4 N. E. 798 (1886); Pangborne v. Westlake, 36 Iowa 546 (1873).

subject matter of the legislation. Where the courts have adopted this rule the fact that the act is prohibited, and thereby made illegal, is not of itself considered sufficient evidence of an intention on the part of the legislature to declare illegal and void all contracts in relation thereto. It is merely one of a chain of circumstances to be taken into consideration.[3] In some of the cases, it is said that a prohibition or a penalty gives rise to a presumption that the intent of the legislature was that all contracts in relation thereto should themselves be illegal and void. But this presumption of illegality is said by the same cases to be only operative where there is nothing in the context of the statute from which an intent one way or the other could be inferred; and where there are present the other factors, usually taken into consideration, the presumption is inoperative.[4]

The Pennsylvania courts have rigidly adhered to a quite different rule, viz., that whenever an act is prohibited, any contract founded upon or in furtherance of the prohibited act is conclusively held to be illegal and void;[5] and, where a statute requires that certain acts shall be done or that they shall be done in a particular way, a failure to comply with the requirements of the statute is equivalent to a violation of a prohibition.[6] While the courts of Pennsylvania, in accord with others, have stated repeatedly that a penalty implies a prohibition,[7] yet it would seem that where a statute contains no prohibition other than such an implied one, contracts affected thereby are not declared to be illegal with the same unfaltering rigidity as those which come within the operation of a true prohibitory enactment, and that the court, in such cases will consider the entire statute for the purpose of ascertaining the legislative intent. It has accordingly been held that a statute, providing that certain requirements should be complied with by all persons engaged in a certain business and making the omission to comply a misdemeanor, did not render acts in conducting the business unlawful, although they might render the person liable to the penalty.[8] It would therefore seem

[3] The Oneida Bank v. The Ontario Bank, 21 N. Y. 490 (1860); Smith, J. in Mitchell v. Smith, 4 Yeates 84, 86 (Pa. 1804).

[4] Harris v. Runnels, 12 How. (U. S.) 79 (1851).

[5] Mitchell v. Smith, 1 Binn. 110 (Pa. 1804); The Com. v. The Commissioners of Philadelphia County, 2 S. & R. 193 (Pa. 1816); Eberman v. Reitzel, 1 W. & S. 181 (Pa. 1841); Bowman v. The Cecil Bank, 3 Gr. 33 (Pa. 1859); Fowler v. Scully, 72 Pa. 456 (1872); Holt v. Green, 73 Pa. 198 (1873); Peet v. Knight, 2 Pa. C. C. 445 (1886); Howard v. Jacoby, 3 Pa. C. C. 436 (1887); The Com. v. The Ins. Co., 14 Pa. C. C. 438 (1894); White v. Buss, 3 Cush. 448 (Mass. 1849); Miller v. Post, 1 Allen 434 (Mass. 1861). See Bank of U. S. v. Owens, 2 Pet.(U. S.) 527 (1829).

[6] Condon v. Walker, 1 Yeates 483 (Pa. 1795); Maybin v. Coulon, 4 Yeates 24 (Pa. 1804); Johnson v. Kolb, 3 W. N. C. 273 (Pa. 1876); Com. v. The Ins. Co., *supra;* Miller v. Post, *supra.*

[7] Mitchell v Smith, 1 Binn. 110 (Pa. 1804); Columbia Bank & Bridge Co. v. Haldeman, 7 W. & S. 233 (Pa. 1844); Holt v. Green, *supra.*

[8] Rahter v. National Bank, 92 Pa. 393 (1880).

that, in Pennsylvania, the refusal to apply principles of construction to a statute is limited to those cases where there is either an express prohibition, or where particular acts are required to be done, or to be done in a certain way, and that in other cases the courts have adopted the principle of construing the entire statute. On the other hand, if there is a prohibition, the nature or even the non-existence of a penalty would appear to be unimportant, inasmuch as the contract is declared to be illegal because it involves an unlawful act, and the unlawfulness of the act is based upon and derived wholly from the prohibition.[9] Where there is a prohibition, no distinction is taken between those cases where the act is merely *malum prohibitum* and those where it is *malum in se*.[10] In an early case[11] it was said that, where the act was *malum prohibitum* only, the plaintiff might recover unless the contract was directly founded upon the illegal act; but this distinction has been expressly repudiated and no longer is recognized in Pennsylvania.[12] While there are no express statements on the subject, it would seem proper that where principles of construction are to be applied to determine the validity of a contract, the distinction between an act *malum prohibitum* and an act *malum in se* should be taken into consideration as one of the factors indicative of the legislative purpose.

The courts of Pennsylvania have repeatedly recognized the fact that the rule adopted by them leads to results, in some cases, which are not only unjust but contrary to good morals. Their answer to this objection, however, has been that the defense is allowed not for the sake of the defendant but for the law itself.[13] In several cases[14] recently decided in one of the Courts of Common Pleas, the rigor with which the rule has been applied is well illustrated. These cases hold that a person or persons doing business under an assumed or fictitious name, without having filed the certificate required by the Act of June 28, 1917, P. L. 645,[15] can-

[9] The Sussex Peerage, 11 Cl. & F. 85, 148–9 (Eng. 1844).

[10] Eberman v. Reitzel, *supra;* Columbia Bank & Bridge Co. v. Haldeman, *supra;* Holt v. Green, *supra.*

[11] Swan v. Scott, 11 S. & R. 155, 164 (Pa., 1824). See Faikney v. Reynous, 4 Burr. 2069 (Eng. 1767).

[12] Columbia Bank & Bridge Co. v. Haldeman, *supra*, at p. 235. See Cannan v. Bryce, 3 B. & Ald. 179 (Eng. 1819).

[13] Lord Mansfield in Holman v. Johnson, Cowp. 341, 343 (Eng. 1775); Yeates, J. in Mitchell v. Smith, 1 Binn. 110, 121 (Pa., 1804); Fowler v. Scully, *supra;* Swing v. Munson, 191 Pa. 582, 588 (1899); Chicago Bldg. & Mfg. Co. v. Myton, 24 Pa. Sup. Ct. 16, 20 (1903).

[14] Sykes Department Store v. The Pennsylvania Railroad Co., 33 York 75 (Pa. 1919); Codorus Planing Mill Co. v. Horn, 33 York 133 (Pa. 1919).

[15] The Act provides that no individual or individuals shall carry on or conduct a business, within the State, under an assumed or fictitious name, without having first filed, with the proper authorities, a certificate setting forth the names of the persons owning, or interested in, the business, and the assumed name under which they intend to carry it on. Failure to comply is made a misdemeanor and is punishable by fine or imprisonment or both.

not recover under a contract made in furtherance of or in the conduct of such business. In the one case, the action was brought to recover for labor and materials furnished the defendant in the course of the business; and in the other, it was sought to recover for an alleged breach of contract for the carriage of goods to be used in the business. They are the first reported cases arising under the Act; and, while they present nothing new, either in the principle or its application, they illustrate all the elements of the rule as it is applied by the Pennsylvania courts.

The rule is applicable in every case where the plaintiff requires the aid of the illegal transaction to establish his case. It is not necessary that the consideration of the contract itself should be the prohibited act. It is sufficient if the consideration is in aid or encouragement of it.[16] Nor is it necessary that the illegality of the transaction should be apparent on the record.[17]

While the results in individual cases may appear to be harsh, it is submitted that the rule applied in these cases is sound in principle. Where the legislature has seen fit to declare an act illegal, it would seem to be foreign to the true purpose of statutory construction to enter into a further investigation of the scope of the act, especially as to a matter which is really collateral.[18] In cases where a transaction has been declared illegal in unambiguous language, it is difficult to see why the intention of the law-making body is not sufficiently clear to render construction unnecessary. Furthermore, the use of rules of construction in such cases would tend to obscure that which before had been clear and obvious. It is probable that the courts which have adopted the principle of construction have been influenced by the opportunity which it affords for the amelioration of the harsh effect of some statutes, rather than that they have been actuated by the belief that the doctrine was preferable in principle to the other.[19] For the courts to give a legal remedy for that which is itself illegal involves an inconsistency which is difficult to support.[20] "Courts of justice sit to carry into execution dispassionately the general will of the community disclosed by the laws. It would seem a solecism in jurisprudence that a contract which necessarily leads to defeat the provisions of an act of the legislature, of the highest public concernment, should receive judicial sanction and support."[21]

R. J. B.

[16] Condon v. Walker, *supra;* Swan v. Scott, *supra;* Badgley v. Beale, 3 Watts 263 (Pa., 1834); Columbia Bank & Bridge Co. v. Haldeman, *supra;* Thomas v. Brady, 10 Pa. 164, 170 (1848); Scott v. Duffy, 14 Pa. 18, 20 (1849); Evans v. Dravo, 24 Pa. 62, 65 (1854); Toler v. Armstrong, *supra;* Spurgeon v. McElwain, 6 Ohio 442 (1834); Gravier v. Carraby, 17 La. (O. S.) 118 (1841).

[17] Holt v. Green, *supra;* the opinion of the lower court in Chicago Bldg. & Mfg. Co. v. Myton, reported in 24 Pa. Super. Ct. 16, 20 (1903); Melchoir v. McCarty, 31 Wis. 252 (1872).

[18] Cannan v. Bryce, *supra.*

[19] Comstock, J. in The Oneida Bank v. The Ontario Bank, 21 N. Y. App. 490, 495 (1860).

[20] Bank of U. S. v. Owens, 2 Pet. (U. S.) 527, 539 (1829).

[21] Yeates, J. in Mitchell v. Smith, 1 Binn. 110, 119 (Pa., 1804).